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Supreme Court, U.S.
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No. 02-561

IN THE

Supreme Court of the United States

HARRY BROWNE and PETER SCHMERL,

Petitioners,

v.

BETSEY BAYLESS, Secretary of State of Arizona,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

REPLY BRIEF

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QUESTION PRESENTED

Whether a state may, consistent with the First and Fourteenth Amendments as construed in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), require an independent candidate for President of the United States to qualify for the ballot almost five months before the general elections and three months before an established political party must designate its presidential candidate, where the state admits that it does not need that amount to time for its election administration.

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INTRODUCTION

The issue presented in this writ of certiorari is one of national importance, involving not only the presidential election process, but the constitutionality of a state's restrictions on a candidate's ability to secure a place on the general election ballot as an independent. The independent candidate option is a constitutionally protected one, *see Storer v. Browne*, 415 U.S. 724, 745-46 (1974), and acts as a safety valve for voters to support candidates who emerge outside the party scheme as independents in reaction to events that unfold in an election campaign. *See Anderson v. Celebrezze*, 460 U.S. 780, 791-93 (1980). In presidential election campaigns, where the contest is nationwide and the laws of one state affect voters beyond its own borders, the independent ballot option is particularly important. *See id.* at 795 (1983). As explained in the Petition for a Writ of Certiorari, Arizona has the second earliest filing deadline in the nation for independent presidential candidates.

In an effort to diminish the importance of the constitutional issue presented by that deadline, Respondent, the State of Arizona, attempts to cast this as a case about a "sore loser" of an intra-party struggle trying to get on the ballot as an independent, and argues that the independent line should be reserved for the "truly independent" candidate (Br. Opp. Cert. 14). The first assertion is incorrect as a matter of fact; the second rests on a flawed principle of law as it would inject into the constitutional analysis of a state's independent presidential candidate route an impermissible inquiry into a candidate's political beliefs. Neither supports denying review of the important constitutional question raised by Arizona's requirement that independent candidates qualify for the ballot almost five months before the general election. Respondent further seeks to avoid review by asserting that Arizona need not establish its independent filing deadline with "exact precision" (Br. Opp. Cert. 9). While states are accorded flexibility in administering their election systems, that flexibility does not insulate from constitutional scrutiny regulations that cannot be

rationally justified and that impose unwarranted burdens on the rights of candidates and their supporters.

I. In the Presidential Election Nomination Process, the First Amendment Requires That a State's Independent Candidate Option Be Available As Late As Practicable So Voters Can Respond to Unfolding Events.

As we saw once again in the 2002 election cycle, unforeseen events as an election year unfolds can fundamentally affect political expectations.[1] Given the inevitable and unpredictable events in the major and minor party nominating process, the First Amendment requires that states' ballot access laws keep available as late as practicable meaningful options for voters to react to developments by supporting a candidate as an independent.

A. Harry Browne Did Not Lose an Intra-Party Struggle; He Sought an Independent Ballot Line After Arizona Erroneously Accepted the Electors of a Person Later Held Not to Legally Represent the Party.

To obscure the fact that Harry Browne was a national candidate on the ballot in 49 states, Arizona seeks to cast this as a case about a candidate "who filed too late" to become an independent candidate "because he failed in his attempt to be the Arizona Libertarian nominee" (Br. Opp. Cert. at 1-2). Absent from Respondent's brief, however, is the undisputed fact that the reason Browne failed to get the Libertarian ballot line in Arizona is that the Secretary of State erroneously gave the line to the electors of a person later held not to represent the Arizona Libertarian Party. *See Arizona Libertarian Party v. Schmerl*, 28 P.3d 848 (Ariz. Ct. App. 2001) (effectively upholding Petitioner and Browne supporter Peter Schmerl's claim to office of State Chair of the Libertarian Party in Arizona).

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1. Three confirmed candidates for Congress, already on the ballot for the November 5, 2002 election, were removed, following the deaths of two (Paul Wellstone on October 25 and Patsy Mink on September 29), and the withdrawal of the third (Robert Torricelli on September 29).

Harry Browne did not lose an intra-party feud. He won by a landslide (with 78% of the vote) the non-binding Libertarian Party presidential primary in Arizona; he secured his party's nomination for President at its 2000 national convention; and his supporters eventually won their lawsuit over who properly represented the Arizona Libertarian Party. *See Browne v. Bayless*, 46 P.3d 416, 417 (Ariz. 2002); *Arizona Libertarian Party*, 28 P.3d at 956-57. Browne's supporters timely filed with the Arizona Secretary of State nomination papers for their slate of presidential electors. (Pet. Br. App. E at 35a.) But a competing slate of Libertarian electors also filed, and the Secretary of State determined to put the competing slate on the ballot. (Pet. Br. App. E at 36a.) Browne's supporters eventually prevailed in the legal dispute about who represented the Party—but not in time for the 2000 election. *See Arizona Libertarian Party*, 28 P.3d at 957. Browne did not just rely on legal action to rectify the situation, however, he sought placement on the ballot as an independent. In so doing, he gathered sufficient petition signatures to demonstrate the necessary voter support Arizona requires. Because the events that precipitated Browne's independent candidacy occurred after Arizona's early filing deadline had passed, however, Browne was barred from the 2000 presidential race in that state. Browne's Arizona supporters—alone in the entire country—could not cast a ballot for him. This is not a "hypothetical burden" (Br. Opp. Cert. at 7). Arizona's early independent filing deadline, Browne's only route to the ballot in light of Arizona's erroneous decision about the Libertarian electors, heavily burdened the freedom of choice and freedom of association of Browne's supporters in the 2000 presidential election.

B. The Constitutionality of a State's Independent Candidate Ballot Deadline Does Not Turn on Whether a Candidate Utilizing the Option Is "Truly Independent," but on Whether the Deadline Allows Voters to Respond to Events in the Party Nominating Process—Whether the Party Is a Major or Minor One.

In elections for the President of the United States, states have a special obligation to ensure that *all* candidates—partisan and independent—can respond to "intervening events [that] create unanticipated political opportunities," *Anderson v. Celebrezze*, 460 U.S. 780, 786 (1983). The major parties retain ultimate flexibility by adopting their presidential nominees and platforms late in the election cycle—as late as Labor Day for the Republicans in 2004.[2] Consistent with the rationale of *Anderson*, the overwhelming majority of states permit comparable flexibility for independents by allowing them to file their candidacies between late July and mid-September. (*See* Pet. Br. App. I, Chart.) Arizona's mid-June filing deadline—the second earliest in the country—prevents independent candidacies from emerging in the wake of events transpiring in the party nominating process thereby constraining the "availability of political opportunity" *see Anderson*, 460 U.S. at 793 (internal quotation omitted).

In *Anderson*, this Court found that Ohio's filing deadline for independent presidential candidates imposed a distinctive, substantial, and ultimately unsupportable burden on the rights of voters because it prevented "a late emerging Presidential candidate outside the major parties whose position on the issues could command widespread community support," from getting on the state general election ballot. *Id.* at 792-93. This Court explicitly recognized that the inevitably shifting nature of events in an election year demands that states have in place a safety

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2. In 2004, the Republican National Convention will not be held until August 31-September 2 and the Democratic Party will convene July 26-29.

valve mechanism for both partisan and independent voters to respond and react:

> In election campaigns, particularly those which are national in scope, the candidates and the issues simply do not remain static over time. Various candidates rise and fall in popularity; domestic and international developments bring new issues to center stage and may affect voters' assessments of national problems. Such developments will certainly affect the strategies of candidates who have already entered the race; they may also create opportunities for new candidacies.

Id. at 790 (citation omitted).

It was the event of Arizona's erroneous rejection of Petitioner Schmerl's presidential electors that ultimately kept Browne from the Libertarian line in Arizona in 2000 and gave rise to the need for him to run as an independent. Yet Arizona's early filing deadline for independent candidates prevented Browne's voters from reacting to this development. That the development occurred in a minor rather than a major party nomination process is not germane to the constitutional analysis. *Cf. Williams v. Rhodes*, 393 U.S. 23, 30 (1968) (upholding as fundamental "the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively.") What matters is whether the supporters of candidates with a modicum of support can express their political preferences by placing their candidate on an independent line.

Respondent would reserve the independent line only for the "truly independent" (Br. Opp. Cert. 14). As a practical matter, and as detailed in the petition for certiorari, many presidential candidates running outside the major parties get on the ballot nationwide by running as minor party candidates in some states and independent candidates in others. (Pet. Br. at 7-8.) Moreover, the notion that those not "truly independent" from a political party have no constitutional right to access an independent line

would entangle courts in scrutinizing a candidate's political beliefs—a concept anathema to the First Amendment.[3]

Nor is the Secretary of State correct that the decision below is "consistent with other federal court decisions upholding independent petition filing deadlines similar to Arizona's" (Br. Opp. Cert. at 13). Two of the three cases cited in support of this proposition are inapposite as they involve independent candidates in non-presidential races. (*Id.*, *citing Wood v. Meadows*, 207 F.3d 708, 716 (4th Cir. 2000) (upholding a June deadline for non-presidential independents); *Council of Alternative Political Parties v. Hooks*, 179 F.3d 64, 74 (3d Cir. 1999) (same)). Those elections do not implicate the rights of voters outside the state nor do they burden candidates with a 50-state ballot access process. Although all independent candidates are entitled to First Amendment protection, the degree of protection necessarily varies with the political office sought. *See Alternative Political Parties*, 179 F.3d at 73 (recognizing that unlike the statute at issue in *Anderson*, "the statute here applies to state and local elections, rather than the national presidential election, and therefore the State's interest is appreciably greater"). The third case cited, *Campbell v. Hull*, 73 F. Supp. 2d 1081, 1092 (D. Ariz. 1999), explicitly did not

3. Arizona cannot defend its early filing deadline for independent candidates by asserting that Browne could "have easily obtained ballot access in Arizona by simply establishing [a] new part[y]." (Br. Opp. Cert. at 14.) Browne was not seeking to abandon the Libertarian Party by forming a new splinter party. He should not be forced to form a new association rather than use an independent option to allow his supporters to express their ballot choice. In any case, "new parties" seeking a place on the ballot face an even earlier filing deadline in Arizona than independent candidates. Under A.R.S. § 16-801, an organized party and its candidates may gain access to the ballot by achieving "new party recognition." To be recognized, a party must garner a specific number of signatures and submit them to the relevant county recorder for verification no later than 112 days prior to the primary election. *Id.*; A.R.S. § 16-803. This option was plainly unavailable to Browne on June 20 when the Secretary of State erroneously rejected his supporters' nomination papers.

uphold the constitutionality of Arizona's early filing deadline as that issue was not before the court. *Id.* ("[T]he Court will rule only on the constitutionality of A.R.S. § 16-341(C), the restriction on support from major party-affiliated voters.").

Similarly misplaced is Arizona's reliance on the successful ballot access of non-presidential independent candidates in the 2002 election to support its argument that the requirements of A.R.S. § 16-341 are reasonable. That four candidates out of a total of 206 for electoral office in 2002 were independents is strong support for Petitioners' argument that it is virtually impossible for a reasonably diligent independent candidate to secure access to the Arizona ballot. There has never been an independent presidential candidate in Arizona since the 1996 amendment. The figures are almost as dismal for independents running for state and national offices in the same period: two were candidates in 1996, one in 1998, and three in 2000. (*See Browne v. Bayless*, Sec'y State Supp. Br., No. CV-01-0383-PR, App. A at 4.)

II. While a State Need Not Establish with "Exact Precision" the Petitioning Deadline for the General Election Ballot, Arizona Has No Justification for Requiring 146 Days to Resolve Challenges to Independent Candidate Petitions When It Resolves Challenges to Party Primary Petitions in 90 Days.

Arizona defends its June 14, 2000, filing deadline for independent candidates as "necessary to allow the Arizona Supreme Court to resolve election challenges and the Secretary of State to prepare and print the final ballot in time for Arizona's early voting" (Br. Opp. Cert. at 3),[4] and argues that the date

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4. The sole official explanation in the record for the 1996 amendment, however, which moved the deadline from 10 days after the primary to 75 days before the primary, was "to allow an independent candidate to file his nominating petition at the same time as candidates from other political parties. (*See* Defs.' Resp. to Special Action at 19, *Browne v. Bayless*, No. CV-00-0327 (Ariz. Sup. Ct., filed Sept. 12,

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chosen to perform those functions need not be determined with "exact precision" (Br. Opp. Cert. at 9). Petitioners recognize that resolving ballot disputes is a legitimate regulatory interest, and that states have some leeway in establishing cut-off dates. *See, e.g.*, *Anderson*, 460 U.S. at 788. However, the regulatory interest in resolving ballot disputes does not inoculate any date the state chooses from constitutional challenge. The date must be reasonable in light of the interest and the work the state needs to carry out. *Id.* at 796.

Here the Secretary of State conceded that she does not need 146 days before the November election to prepare the Arizona presidential ballots. *Browne v. Bayless*, 25 P.3d 749, 753 (Ariz. Ct. App. 2001). Even without this admission, the fact that Arizona has imposed the same deadline for filing petitions for a place on the primary election ballot as for the general election ballot establishes that the deadline for the general election ballot is not reasonable *on its face*.[5] The state argues that its early deadline is necessary because "election challenges have increased," and that this fact led to the 1999 amendment to the election code moving the filing deadline for candidates back an additional 15 days. (Br. Opp. Cert. at 10).[6] However, the legislative history is clear that the need for more time to resolve ballot disputes concerned the September *primary* election, not the November *general* election. (*See* Defs.' Resp. to Special

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(Cont'd)

2000).) In light of the undeniably different burdens the statute places on independent and partisan candidates, this "equal treatment" justification has no merit. (*See* Pet. Br. at 20-21; *but see* Br. Opp. Cert. at 9 (claiming that the State "did not discuss this interest" in proceedings below).)

5. The primary takes place eight weeks prior to the general election, A.R.S. § 16-201, and the filing deadline is 90 days before that, A.R.S. § 16-311(A); 16-341(C).

6. The state cites seven petition challenges during the 2000 election, none of which involved independent presidential candidates, and all of which were resolved before the primary, as the legislature intended when it amended the statute. (Br. Opp. Cert. at 11 (citations omitted).)

Action at 19, *Browne v. Bayless*, No. CV-00-0327 (Ariz. Sup. Ct., filed Sept. 12, 2000).)[7] Arizona has never explained why challenges to the nominating petitions of independent presidential candidacies have to be resolved well in advance of the September primary when presidential candidates do not compete in the primary. The only deadline of any relevance to independent presidential candidates is the general election on the first Tuesday in November. Ballots for that election go to print around September 17. (*See Browne v. Bayless*, No. CV-01-0383-PR, Sec'y State Supp. Br. App. A at 10 (Ariz. S. Ct., filed Feb. 11, 2002).)

There is no rational basis for the state to require 90 days to resolve election challenges and ready the primary ballot, but 146 days for resolution of the miniscule number of potential challenges to petitions of independent presidential candidates and preparation of the general election ballot. The State has not suggested that it is subject to a wholly different set of administrative tasks in the primary compared to the general election. Early balloting, compliance with translation obligations of Section 5 of the Voting Rights Act, and printing optical scan ballots are as much features of the primary as the general election. *See, e.g.*, A.R.S. § 16-542(A) (requests for an official early ballot may be made "before any election;" military and overseas ballots must be ready 45 days before the election); Voting Rights Act, 40 Fed. Reg. 43746 (Sept. 23, 1975); (*Browne*

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7. The State offers no support for its assertion that "the deadline was calculated to allow the election officials enough time to prepare the general election ballot and for the courts to resolve any challenges to independent candidacies" (*Id.* at 8 n.2.) Nor can it. The record is devoid of any evidence of concern with the general election or independent presidential candidacies. Similarly unsupported and untenable is the State's novel argument that "[c]alculating the deadline based on the primary election was just one way of setting the deadline. The Legislature could have arrived at the same date based on the general election." *Id.* The only issue before this Court is the constitutionality of A.R.S. § 16-341 which reflects what the Legislature did, and not what else it could have done.

v. Bayless, No. CV-01-0383-PR, Sec'y State Supp. Br. App. A at 6 (Ariz. S. Ct., filed Feb. 11, 2002) ("Most of the voters in Arizona now vote on optical scan ballots rather than punch card ballots."). The Secretary of State has never specified the amount of time she needs to complete any of these tasks. Despite repeated requests from Petitioners at every level of the proceedings below, Arizona has also consistently failed to explain why tasks it needed 46 days to complete for every presidential election from 1909-1996, it now needs 146 days to finish.

What we do know is that the majority of states are subject to similar pre-election administrative demands and yet manage to prepare their general election ballots every four years in a timely fashion despite filing deadlines for independent presidential candidates that fall as late as September 20th. *See* Vt. Stat. Ann. tit. xvii, § 2386 (2000) (setting deadline for independent presidential candidates 47 days before general election). Approximately forty states satisfy administrative requirements while allowing independent presidential candidates to file papers in August and September. (*See* Pet. Br. at App. I, Chart.) More importantly, Arizona itself timely prepared the general election ballot for eighty years despite a filing deadline for independents that fell in mid-September, ten days *after* the primary. For much of that time, Arizona had to translate election materials pursuant to the Voting Rights Act—to which it became subject in 1972, 40 Fed. Reg. 43746 (Sept. 23, 1975)—and had effective "early balloting" in the sense that it had to prepare absentee and overseas ballots in advance of the general election date.

Petitioners do not dispute Arizona's description of its requisite administrative tasks; but they do contend that the State's administrative justification for the June filing deadline is not applicable to independent presidential candidates.

CONCLUSION

For these reasons and those set forth in the petition for writ of certiorari, the petition should be granted.

Respectfully submitted,

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